INDEX

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	11

AUTHORITIES CITED

CASES:

Bowe v. *Colgate-Palmolive Company*, 416 F.2d 711 (7th Cir. 1969)	5, 6
Cox v. *Babcock & Wilcox Company*, 471 F.2d 13 (4th Cir. 1972)	5
McDonnell Douglas Corp. v. *Green*, — U.S. —, 36 L.Ed. 2d 668 (1973)	8
Pettway v. *American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969)	5, 6
Stebbins v. *Allstate Insurance Companies*, 400 U.S. 909 (1970)	2
Stebbins v. *Keystone Insurance Company, et al.*, — U.S. App. D.C. —, 481 F.2d 501 (1973)	4, 10

STATUTES:

28 USC 2072	9
42 USC 1981	7
42 USC 2000e	7

MISCELLANEOUS:

Fifth Amendment of the Constitution of the United States	9
Rule 12, FECP	9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1476

EMMETT J. STEBBINS, *Petitioner,*

v.

ALLSTATE INSURANCE COMPANIES

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, Allstate Insurance Companies, respectfully submits the following Brief In Opposition To The Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether the complaint states a claim upon which relief can be granted?

STATEMENT OF THE CASE

In order to place the current controversy in proper perspective it is necessary to refer to prior litigation between the Petitioner and this Respondent. A similar action was previously filed by the Petitioner against this Respondent in the District Court for the District of Columbia (Civil Action No. 2484-68). The complaint there also charged unlawful employment practices. Respondent's motion for summary judgment in that case was granted on the ground that its refusal to employ the Petitioner was due to his failure to complete the required application and was not due to any discrimination proscribed by the Civil Rights Act of 1964. This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit on May 19, 1970, and this Court denied certiorari on November 9, 1970, 400 U.S. 909. Certain exhibits in that case, of which this Court may take judicial notice, are attached hereto as Exhibits A and B. It is important to note Judge McGuire's finding in his order of March 6, 1969—"that since Plaintiff (Petitioner) failed and refused to complete an application for employment Defendants (Respondent) have not refused to employ him . . . ."

On May 31, 1970, Petitioner wrote to Respondent at its Rockville, Maryland, office, requesting advice on "job opportunities" in the Eastern Zone and particularly in Maryland, the District of Columbia and Virginia. He also requested that he be furnished with "listed" vacancies and "standard job description and specification." A copy of this letter is attached hereto as Exhibit C.

On June 22, 1970, Respondent informed Petitioner that if he were interested in making application for

employment he should apply to Respondent's office in Roanoke, Virginia. A copy of this reply is attached hereto as Exhibit D.

On July 6, 1970, Petitioner wrote to Respondent's Roanoke office requesting the same information as in his letter of May 31, 1970. A copy of this letter is attached hereto as Exhibit E.

Respondent attempted to reply to Petitioner's July 6, 1970 letter but, for reasons unknown to it, a mailed reply was returned undelivered.

On June 10, 1971, Petitioner wrote to Respondent's office in Roanoke, Virginia, requesting the same information as in his letters of June 22, 1970 and July 6, 1970. A copy of this letter is attached hereto as Exhibit F.

On June 28, 1971, Respondent wrote to Petitioner indicating that, in the Company's opinion, his letters were a form of harassment, that it was clear that Petitioner was not interested in obtaining a position with the Company and that no purpose would be served by replying to his letters or in conducting further correspondence with him. A copy of this letter is attached hereto as Exhibit G.

Petitioner filed his Complaint in this action on September 2, 1971.

On September 23, 1971, Respondent filed a Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted. The Motion alleged three bases for dismissal: (1) The complaint is barred by the doctrine of collateral estoppel; (2) the complaint is frivolous, totally without merit and was filed in bad

faith; and (3) the complaint fails to state a claim upon which relief can be granted. Numerous pleadings concerning discovery were filed but all discovery was held in abeyance pending action on the motion to dismiss. The motion to dismiss was granted on December 17, 1971, and Petitioner's motion to vacate the order of dismissal was denied on February 2, 1972.

On March 2, 1972, Respondent filed his Notice of Appeal to the United States Court of Appeals for the District of Columbia. Further proceedings on the appeal were held in abeyance pending decision in the case of *Stebbins* v. *Keystone Insurance Company, et al.*, No. 24,658. The Court decided that case on June 5, 1973 (reported at —— U.S. App. D.C. ——, 481 F.2d 501), and on July 24, 1973, ordered the current case to be, "remanded to the District Court for proceedings not inconsistent with this Court's decision in *Emmett J. Stebbins* v. *Keystone Insurance Co., et al.*" The *Keystone* case held that where a motion for summary judgment in a prior case had been based on two grounds: (1) failure to file an employment application, and (2) unemployability in any position of fiscal trust in the insurance industry, the doctrine of collateral estoppel could not be applied to prevent relitigation of the issue of employability in a subsequent proceeding.

It is important to note that, although the mandate of the Court of Appeals returning this case to the District Court is dated August 15, 1973, the case was actually returned to, received by, and entered on the Docket of the District Court on August 21, 1973.

On August 30, 1973, within the 10-day period permitted for further pleading, Respondent filed a Motion To Dismiss The Complaint For Failure To State A

Claim Upon Which Relief Can Be Granted. This motion alleged only two bases for dismissal: (1) the complaint is frivolous, totally without merit and was filed in bad faith, and (2) the complaint fails to state a claim upon which relief can be granted. Without specificity as to grounds, this motion was granted and the complaint dismissed by order of the District Court dated September 14, 1973. Petitioner's Motion To Alter Or Amend this order was denied on October 19, 1973 and on November 8, 1973, Petitioner appealed to the United States Court of Appeals for the District of Columbia. That Court on February 4, 1973, *sua sponte,* affirmed the order of the District Court and on February 27, 1974, denied Petitioner's Motion To Reconsider En Banc.

On April 3, 1974, Petitioner filed his petition for a writ of certiorari in this Court.

ARGUMENT

I. Proceedings Subsequent to the July 24, 1973, Decision of the United States Court of Appeals for the District of Columbia Circuit were Procedurally Proper.

Petitioner claims that the proceedings in the District Court subsequent to remand from the Court of Appeals denied him procedural due process and initially argues that the decision in this case should be reviewed because it is in conflict with other decisions such as: *Cox* v. *Babcock & Wilcox Company,* 471 F.2d 13 (4th Cir. 1972), *Pettway* v. *American Cast Iron Pipe Company,* 411 F.2d 998 (5th Cir. 1969), and *Bowe* v. *Colgate-Palmolive Company,* 416 F.2d 711 (7th Cir. 1969).

In *Cox* the Fourth Circuit affirmed a finding by the lower court, after a full trial, that the individual plain-

tiff had not been discriminated against and reversed the lower court's dismissal of the class action feature of the case and remanded that part of the case to the District Court with instructions that if proper claims for further relief were not presented within a reasonable time, the class action should be dismissed. There is no conflict between that decision and the case *sub judice*. In the *Cox* case obviously there was a complaint which properly alleged a class action complaint for unlawful discrimination in employment. Such is not the case here because there is no valid complaint which could be returned to the lower court.

In *Pettway* the Fifth Circuit held that under the Civil Rights Act of 1964 an employee could not be discharged for filing a complaint with the Equal Employment Opportunity Commission, even though the complaint might contain false and malicious material directed toward the employer. There is no conflict between that decision and the case *sub judice*. Simply put, the *Pettway* case and the issues involved therein have absolutely no resemblance to any issue in the current case.

In *Bowe* the Seventh Circuit held that a classification restricting women to bidding on jobs not requiring lifting of more than 35 pounds violated the Civil Rights Act of 1964. The Petitioner quotes certain language from this case pointing out the essential class nature of violations of Title VII of the Civil Rights Act. However, he fails to indicate what that has to do with any issue in the case *sub judice*. Indeed, he cannot do so for it borders on the frivolous to even argue that the decision in *Bowe* is in conflict with the decision in this case.

Petitioner next argues that, following remand from the Court of Appeals, respondents were required to file answers to the complaint and that their failure to do so deprived him of procedural due process. This is but an obtuse way of alleging that the determinations that the complaint does not state a claim upon which relief can be granted, that is, the actual decisions of the courts below, were incorrect.

II. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

Petitioner in his Complaint attempts to allege violations of (1) the Civil Rights Act of 1866, 42 U.S.C. 1981, (2) Section 703 (a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and (b), and (3) Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a).

In the prior action Petitioner went to Respondent's office in Rockville, Maryland and indicated an interest in obtaining employment. He was given certain tests and received an application for employment. He returned the application but it was incomplete and lacking in the detail required for proper consideration. He was requested to complete the application but failed to do so. Petitioner subsequently brought suit against Respondent alleging a failure to hire because of racial discrimination. The District Court granted Respondent's Motion For Summary Judgment and, in so doing found that "... since Plaintiff (Petitioner) failed and refused to complete an application for employment Defendants (Respondent) have not refused to employ him." (Order dated March 6, 1969, Exhibit B).

As is evident from Exhibits C to G, since the last action, although Petitioner knew that he had to com-

plete an application for employment, he has not taken any steps to complete and submit the required application. His failure to do so and the absence of any allegation in the Complaint that he has done so precludes the Complaint from stating a claim upon which relief can be granted.

An essential requirement of each of the three allegations of the Complaint is that the Petitioner be a *bona fide* applicant for employment. This presupposes completion and submission of the application required of all such applicants. As a result of the prior litigation the Petitioner well knew that to be considered as an applicant for employment he had to complete and submit the application which had been furnished to him. He has not done so and this failure defeats his current claim.

This Court has recently addressed a similar issue concerning suits under Title VII of the Civil Rights Act of 1964. In *McDonnell Douglas Corp.* v. *Green*, — U.S. —, 36 L.Ed. 2d 668 (1973), the Court stated:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) *that he applied and was qualified for a job for which the employer was seeking applicants;* (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (emphasis added)

Since the Petitioner did not properly apply for employment with Respondent Allstate Insurance Companies, and has not alleged that he did so with respect

to each aspect of the Complaint, the Complaint fails to state a claim upon which relief can be granted.

Petitioner claims that the failure of Respondent to file a "responsive pleading" violates the Fifth Amendment to the Constitution and the enabling provisions for the Federal Rules of Civil Procedure, 28 U.S.C. 2072, and more particularly that the action taken by the District Court was contrary to Rule 12(a)(1) and Rule 12(b) of the Federal Rules of Civil Procedure. Insofar as here pertinent, Rule 12 provides:

Rule 12

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT OF THE PLEADINGS

(a) *When Presented.* A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him .... The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; ....

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted, ...

Petitioner apparently contends that it was error not to require Respondent to file an answer and that the failure to do so was a violation of the mandate of the Court of Appeals and the Federal Rules. The main

thrust of this contention must be that the action by the Court of Appeals on July 24, 1973 remanding the case to the District Court was a *denial* of Respondent's previously filed motion to dismiss. Of course, this was not the effect of the action of the Court of Appeals and the subsequent procedure followed by the District Court and affirmed by the Court of Appeals was proper and in accordance with the Federal Rules of Civil Procedure.

On July 24, 1973, the Court of Appeals remanded this cause to the District Court, "for proceedings not inconsistent with this Court's decisions in *Emmett J. Stebbins* v. *Keystone Insurance Co., et al., supra.* In that case the Court held that where a motion for summary judgment in a prior case had been based on two grounds: (1) failure to file an employment application, and (2) unemployability in any position of fiscal trust in the insurance industry, the doctrine of collateral estoppel could not be applied to prevent relitigation of the issue of employability in a subsequent proceeding. Since one of the grounds urged in the original motion to dismiss was the doctrine of collateral estoppel (see the Motion To Dismiss filed herein on September 23, 1971, and the Memorandum of Points and Authorities in support thereof), it is easy to see why this cause was remanded to the District Court for further proceedings. It is equally easy to see that the action of the Court of Appeals did not amount to a denial of the motion to dismiss such as to require Respondent to file an answer to the complaint. All the Court of Appeals did was to reverse the grant of the motion. Indeed, that is all they had power to do, for the authority to grant or deny motions to dismiss lies with the District Court and not the Court of Appeals.

Following remand, Respondent filed another motion to dismiss which contained two grounds: (1) that the complaint was frivolous, totally without merit and was filed in bad faith, and (2) that the complaint failed to state a claim upon which relief could be granted. This motion was filed within 10 days after the return of the case to the District Court, so it was timely filed. Rule 12(b)(6) of the Federal Rules was as applicable following remand as it was originally. Since that rule provides that failure of the complaint to state a claim upon which relief can be granted is a defense which may be raised by motion, the filing and granting of the motion were procedurally proper. As indicated above, the granting of the motion was also substantively correct.

CONCLUSION

The decisions below are procedurally and substantively correct and no special or important reasons have been shown why they should be reviewed. The decisions below are not in conflict with decisions of other circuits. No important question of federal law is involved therein, and all matters below followed the usual course of judicial proceedings.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Emmett J. Stebbins, Petitioner, 5880 Eastern Avenue, N. E., Washington, D. C. 20011, by mail, postage prepaid and properly addressed, this 6th day of May 1974.

Stuart Rothman